Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 58 | Issue 1 Article 6

1982

The Death Penalty Cases: Shaping Substantive Criminal Law

David R. Schieferstein
Indiana University School of Law

The Death Penalty Cases: Shaping Substantive Criminal Law

The United States Supreme Court has slowly, almost painfully, come to grips with the implications of its 1972 plurality opinion that the death penalty does not constitute cruel and unusual punishment per se.[1] Subsequent decisions by the Court, however, while defining the due process parameters of a constitutional capital punishment scheme, have not been entirely free of internal inconsistency.[2] Recent cases have illustrated the struggle with this need to ensure scrupulous adherence to the highest standards of procedural due process.[3]

States which have chosen to retain a capital punishment scheme have not enacted identical statutes, but the various death penalty laws generally provide for similar sentencing procedures. The typical capital murder trial is separated into two distinct stages: one in which the defendant's guilt or innocence is determined (the "guilt stage") and, should the defendant be found guilty, one in which the appropriate punishment is assessed (the "sentencing stage").[4] In this bifurcated system, the court is reconvened

---

[1] Furman v. Georgia, 408 U.S. 238 (1972). In *Furman*, it seemed clear that a majority of the Court would hold that the death penalty need not invariably violate the Constitution although that ruling was not specifically reached. *See id.* at 307-08 (Stewart, J., concurring); *id.* at 310-11 (White, J., concurring); *id.* at 396-97 (Burger, C.J., dissenting). In Gregg v. Georgia, 428 U.S. 153 (1976), the Court explicitly stated that the death penalty is not per se cruel and unusual punishment. *Id.* at 169 (Stewart, J., plurality opinion).

[2] *Compare* Woodson v. North Carolina, 428 U.S. 280 (1976) (requiring highly particularized individual sentencing) *with* Gregg v. Georgia, 428 U.S. 153 (1976) (requiring consistency in sentencing and prohibiting disproportionate sentences). *See generally* Note, *Capital Punishment and the Burden of Proof: The Sentencing Decision*, 17 CAL. W.L. REV. 316, 321 (1981).

[3] "Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed be constitutionally beyond reproach." Commonwealth v. McKenna, 476 Pa. 428, 440, 383 A.2d 174, 181 (1978). *See also*, Sher v. Stoughton, 516 F. Supp. 534, 547 (N.D.N.Y.), *rev'd on other grounds*, 666 F.2d 791 (2d Cir. 1981); Note, *The Impact of a Sliding-Scale Approach to Due Process On Capital Punishment Litigation*, 30 SYRACUSE L. REV. 675 (1979).

[4] The Indiana death penalty law, set out below is, except for the two sections in italics, representative of the procedure and substantive content of most states' capital punishment laws. The statute provides:

> (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one [1] of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one [1] of the aggravating circumstances alleged.
>
> (b) The aggravating circumstances are as follows:
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

for a sentencing hearing if a guilty verdict is returned in the initial stage of the trial. If the state is seeking the death penalty, it must prove, usually

---

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.
(3) The defendant committed the murder by lying in wait.
(4) The defendant who committed the murder was hired to kill.
(5) The defendant committed the murder by hiring another person to kill.
(6) The victim of the murder was a correction employee, fireman, judge, or law-enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.
(7) The defendant has been convicted of another murder.
(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.
(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:
(1) The defendant has no significant history of prior criminal conduct.
(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
(3) The victim was a participant in, or consented to, the defendant's conduct.
(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
(5) The defendant acted under the substantial domination of another person.
(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:
(1) the aggravating circumstances alleged; or
(2) any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall *recommend* to the court whether the death penalty should be imposed. The jury may *recommend* the death penalty only if it finds:
(1) that the state has proved beyond a reasonable doubt that at least one [1] of the aggravating circumstances exists; and
(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberation, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

beyond a reasonable doubt,[5] that certain aggravating circumstances exist and that these aggravating circumstances, which are made explicit in the statute, outweigh any mitigating circumstances.

The sentencing stage of the bifurcated capital murder trial is the legislative response to the constitutional mandates of *Furman v. Georgia*,[6] which held, *inter alia*, that the death penalty could not be imposed

---

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:
(1) that the state has proved beyond a reasonable doubt that at least one [1] of the aggravating circumstances exists; and
(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.
(h) A death sentence is subject to automatic review by the Supreme Court. The review, which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. The death sentence may not be executed until the Supreme Court has completed its review.

IND. CODE § 35-50-2-9 (1982).

This statute is typical with its provisions for weighing specific aggravating and mitigating circumstances in a proceeding separate from the guilt stage of the trial. *See, e.g.*, ARK. STAT. ANN. § 41-1302 (1977); CAL. PENAL CODE § 190.3-4 (West Supp. 1982); COLO. REV. STAT. § 16-11-103 (Supp. 1982); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1982); DEL. CODE ANN. tit. 11, § 4209 (Supp. 1982); GA. CODE ANN. § 26-3102 (1978); ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1979); KY. REV. STAT. § 532.025 (Supp. 1982); LA. CODE CRIM. PROC. ANN. art. 905.3 (West Supp. 1982); MD. ANN. CODE art. 27, § 413 (1982); MISS. CODE ANN. § 99-19-101 (Supp. 1982); MO. ANN. STAT. § 565.006 (Vernon 1979); NEV. REV. STAT. § 175.554 (1979); N.H. REV. STAT. ANN. § 630.5 (Supp. 1981); N.M. STAT. ANN. § 31-20A-1 (1981); N.C. GEN. STAT. § 15A-2000 (Supp. 1981); OHIO REV. CODE ANN. § 2929.03 (Page 1982); OKLA. STAT. tit. 21, § 701.11 (Supp. 1982-83); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1982); S. D. CODIFIED LAWS ANN. § 23A-27A-4 (1979); TENN. CODE ANN. § 39-203 (1982); TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981); UTAH CODE ANN . § 76-3-207 (1978); VA. CODE § 19.2-264.4 (Supp. 1981); WYO. STAT. § 6-4-102 (1977). *Cf.* TEX. PENAL CODE ANN. § 19.03 (Vernon 1974).

The Texas death penalty is markedly different as it incorporates many of the aggravating circumstances into the statutory definition of captial murder. The statute retains the separate sentencing proceeding but instead of weighing aggravating and mitigating circumstances, it requires the jury to answer in the affirmative three questions as a prerequisite to imposition of the death penalty. Those three questions are:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1973).

Finally, note that under the Indiana death penalty law, the jury only recommends what it considers to be the proper punishment. IND. CODE § 35-50-2-9(e) (1982). If the jury cannot agree upon a sentence recommendation, it is discharged by the court which then proceeds as if the hearing had been to it alone. IND. CODE § 35-50-2-9(f) (1982).

[5] The standard of proof under the Indiana death penalty law, as well as most other states' laws, is the "beyond a reasonable doubt" standard. *See, e.g.*, IND. CODE § 35-50-2-9(e)(1) (1982). The use of a standard less strict than the "beyond a reasonable doubt" standard, even where the fact finder is the jury, raises further constitutional questions which are beyond the scope of this note but are addressed elsewhere in the literature. *See, e.g.*, Note, *supra* note 2.

[6] 408 U.S. 238 (1972).

arbitrarily,[7] and *Woodson* v. *North Carolina*,[8] which required that the sentencing process consider the individual defendant's character and actions.[9] These sentencing procedures require certain factual findings to be made, in addition to those necessary to support a guilty verdict on the murder charge, and an evaluation of the defendant's culpability for his acts as a prerequisite to the imposition of the death penalty.

The subject of this note arises because the role of fact finder in the sentencing stage has not uniformly been given to the jury—the party traditionally and constitutionally charged with finding facts and determining culpability in a criminal trial.[10] Briefly, this note argues that the interaction between Supreme Court precedents[11] and the states' bifurcated capital punishment schemes has wrought a substantive change in the elements of the various degrees of homicide. The sentencing stage of a capital murder trial has become, in substance, a trial to determine if the defendant, already found guilty of "mere murder," is also guilty of the greater crime of "capital murder."[12] Under this view, mere murder is a lesser included offense of capital murder, and the aggravating circumstances are actually factual elements of a crime distinct from the mere murder for which the defendant has already been found guilty. Because the state is now charging the defendant with a distinct crime, the Constitution and its procedural due process guarantees require that these additional fact findings be made *by the jury*; those states which relegate the jury to an advisory role or dismiss the jury altogether following the guilt stage have enacted unconstitutional death penalty laws.[13]

---

[7] This characterization of *Furman* was adopted by the Court in *Gregg*, 428 U.S. at 189 (plurality opinion).

[8] 428 U.S. 280 (1976).

[9] *Id.* at 304. "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death." *Id.* (citations omitted).

[10] As noted above, Indiana and certain other states relegate the jury to a purely advisory role in the sentencing proceeding. *See* IND. CODE § 35-50-2-9 (1982); ALA. CODE § 13A-5-46 (1982); FLA. STAT. ANN. § 921.141 (West Supp. 1982). A number of states dismiss the jury altogether and require the trial judge or a panel of judges to determine the sentence. *See*, ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1982-1983); IDAHO CODE § 19-2515 (1979); MONT. CODE ANN. § 46-18-301 (1981); NEB. REV. STAT. § 29-2520 (1979); OR. REV. STAT. § 163.116 (Supp. 1979) (repealed 1981). The majority of states, however, provide that the death penalty can be imposed only after a jury has returned the appropriate findings of fact. *See* statutes cited *supra* note 4.

[11] The latest of which is Bullington v. Missouri, 451 U.S. 430 (1981). *See infra* text accompanying notes 17-45.

[12] The terms "mere murder" and "capital murder" are not statutory terms. This note will use the term "mere murder" to refer to those murders that meet the statutory definition of a state's highest degree of homicide but for which the death penalty cannot be imposed, either because of the nonexistence of a statutory aggravating factor or because of a counterbalancing mitigating factor. A "capital murder," as the term is used herein, refers *only* to those murders for which the death penalty can be imposed.

[13] Alabama and Indiana courts have not yet articulated the standards a judge must follow

The first part of this note analyzes the Supreme Court decisions which have shaped the substantive criminal law in capital murder cases. This section discusses *Bullington* v. *Missouri*,[14] which demonstrates how the substantive and procedural aspects of the bifurcated capital murder trial have obscured the traditionally sharp distinction between the determination of guilt and the assessment of punishment—a distinction which carries with it important procedural due process ramifications. This section also contains a criticism of other possible resolutions to this problem. The second part of this note focuses upon the procedural due process requirements imposed by the Supreme Court, discussing these in the context of the bifurcated capital murder trial, and concludes that a viable death penalty statute must allow the jury to make a binding decision regarding the imposition of capital punishment.

THE DEATH PENALTY CASES: SHAPING SUBSTANTIVE CRIMINAL LAW

Prior to the Supreme Court's death penalty decisions in the 1970's, few courts accepted the argument that there existed any significant distinction between murders punishable by death and those which were not.[15] Sentencing in a capital trial was largely a matter of unfettered discretion

---

in setting aside a jury's recommendation in the sentencing proceeding. The Florida Supreme Court, however, has ruled that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a death sentence should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d. 908, 910 (Fla. 1975). It should be clear, however, that if the right to a jury trial of the aggravating facts is a constitutional requirement, no self-imposed standard of review, no matter how strict, can be used to excuse denial of that right.

Under the view taken in this note, the statutory grant of power to a judge to overrule the jury's findings is, in effect, the grant of power to the judge to give the state a judgment notwithstanding the verdict in a criminal trial, a constitutionally impermissible result. *See* Burks v. United States, 437 U.S. 1 (1973). "[W]e necessarily accord absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision." *Id.* at 15-16 (emphasis omitted).

Since the thesis of this note is that the defendant has a right to a jury determination of sentencing facts, this note does not affect statutory provisions which allow the judge to impose a sentence based on the jury's findings of fact or which allow a judge to impose a life sentence despite findings sufficient to support the death penalty. It should also be noted that a defendant can always make an informed waiver of his right to a jury trial.

[14] 451 U.S. 430 (1981).

[15] *But see*, Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 811 (1969); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963). These are two of the few cases in which courts, for the purposes of double jeopardy analysis, recognized this difference by using an "implied aquittal" rationale even though specific fact-finding was not then required for sentencing. In the *Henderson* case, Justice Traynor wrote for the California Supreme Court, en banc, that "[i]t is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments or allows the court or jury to fix different punishments for the same crime." *Id.* at 497, 386 P.2d at 686, 35 Cal. Rptr. at 86.

with a wide range of possible punishments.[16] In 1972, however, the Court issued a fragmented decision in *Furman v. Georgia*[17] which struck down two state death penalty statutes and sent shock waves of change throughout state legislatures. The exact parameters of the Court's holding were vague,[18] but it was clear that the majority of the states' death penalty laws, which allowed juries complete discretion in the imposition of the death penalty, could not withstand the eighth amendment scrutiny of at least five of the Justices.[19]

The predominant theme of *Furman* was that state death penalty laws were capable of being applied in an arbitrary and capricious manner—that "under these laws no standards govern the selection of the [death] penalty [and] [p]eople live or die, dependent on the whim of one man or of 12."[20] For a majority of the Court, the problem with the death penalties imposed in *Furman* was arbitrary application—that "there [was] no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[21]

If the exact scope of *Furman* was not clear, its message to legislators was. By the time the Supreme Court again addressed a death penalty issue, thirty-five states and the United States Congress had responded to *Furman* with new death penalty legislation.[22] The statutory responses typically took one of two approaches: the statutes either specified certain factors to be weighed and the procedures to be followed for the imposition of the death penalty, or made the imposition of a death sentence mandatory for specific crimes.[23]

In a group of five companion cases,[24] the Court examined these legislative answers to *Furman*, and upheld those statutes which sought to limit the jury's sentencing discretion by specifying particular aggravating and mitigating circumstances and by providing for a proportionality review by an appellate court.[25] In *Woodson v. North Carolina*[26]

---

[16] *See Bullington*, 451 U.S. at 439-40 & n.13.

[17] 408 U.S. 238 (1972).

[18] The per curiam opinion was but one paragraph holding that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-40. Five Justices then filed individual concurring opinions expressing widely divergent views.

[19] Justices Marshall and Brennan were prepared to declare that the death penalty was unconstitutional per se. *See Gregg*, 428 U.S. 153, 226-31 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting). The other concurring opinions generally intimated that a sentencing procedure which set standards to guide a jury's discretion would be constitutional. *See, e.g., Furman*, 408 U.S. at 400 (Burger, C.J., dissenting).

[20] *Furman*, 408 U.S. at 253 (Douglas, J., concurring).

[21] *Id.* at 313 (White, J., concurring).

[22] *See Gregg*, 428 U.S. at 179-80 & n.23 (plurality opinion).

[23] *Id.* at 179-80 & nn.23-24.

[24] *Gregg*, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); *Woodson*, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[25] *See Gregg*, 428 U.S. 153 (1976); *Proffit*, 428 U.S. 242 (1976); *Jurek*, 428 U.S. 262 (1976).

[26] 428 U.S. 280 (1976).

and *Roberts v. Louisiana*,[27] however, the Court declared that mandatory death penalties violated the eighth amendment's requirement of "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[28] Mandatory death penalties suffered from the same problem the Court had articulated in *Furman*. Without concrete, reviewable findings there was simply no indication that the decision to impose the death penalty was a rational and informed one. As Justice Stewart's plurality opinion explained it:

> This conclusion rests squarely on the predicate that the *penalty of death is qualitatively different from a sentence of imprisonment, however long*. Death in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[29]

The *Furman* line of cases shows that the existence of aggravating circumstances and their relationship to any mitigating circumstances are not only *statutorily* necessary elements of a viable capital punishment scheme but are "constitutionally indispensable" elements for the imposition of the death penalty. If the crime of murder requires proof of additional factual circumstances in order to be punishable by death, it is not unreasonable to argue that the Court has created two distinct crimes of murder; owing to the qualitative difference of the death sentence,[30] murder punishable by only life imprisonment (mere murder) becomes a lesser included offense of murder punishable by death (capital murder).[31]

---

[27] 428 U.S. 325 (1976).

[28] *Woodson*, 428 U.S. at 304.

[29] *Id.* at 305 (emphasis added).

[30] The qualitative difference between the death sentence and any other sentence which would be imposed in this country has been expressly recognized by a majority of the Court. See Gardner v. Florida, 430 U.S. 349, 357 (1976) (opinion of Stevens, Stewart & Powell, JJ.); *Gregg*, 428 U.S. 153, 181-88 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *id.* at 231-41 (Marshall, J., dissenting); *Furman*, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 314-71 (Marshall, J., concurring).

[31] In practical effect there is no substantive difference between the gradational differences that exist between manslaughter and murder and the gradational differences between mere murder and capital murder. In both cases proof of the existence of additional elements supports a more severe sentence for the act and represents a legislative determination that the actor is sufficiently more culpable so as to justify that sentence.

Other courts have suggested the view that mere murder is a lesser included crime of captial murder. *See, e.g.*, Gully v. Kunzman, 592 F.2d 283, 289 (6th Cir. 1979) wherein the court considered the problem:

> We have also considered the possibility that, by virtue of their exposure to the new death statute, petitioners are not simply being retried for the same 'offenses' but are, in effect, being tried for greater inclusive 'capital offenses' of the crimes of willful murder and armed robbery with which they were charged at the first trial. We do not think this analysis far-fetched, since, under the new scheme, a defendant convicted of a capital offense may not be sentenced

While the traditional scope of the sixth amendment right to a jury trial has not been extended to sentencing determinations,[32] the Supreme Court has long adhered to the view that "no man should be deprived of his life under the forms of law unless *the jurors* who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reaonable doubt *the existence of every fact necessary to constitute the crime charged.*"[33] Combining this with the implication of *Furman* and its progeny, that there are two distinct crimes of murder, it is reasonable to conclude that a jury trial at the sentencing stage is required. *Bullington* compels this conclusion, as it firmly conceptualizes the notion that there now are two distinct crimes of murder.

Bullington v. Missouri: *A Substantive Perspective on Procedural Forms*

As noted above, *Furman* and its progeny have brought about a substantive change in the law which affects the way in which procedural due process requirements, developed for the criminal trial, are applied to the capital sentencing hearing. *Bullington v. Missouri*[34] illustrates how this interaction can alter apparently long-settled constitutional doctrines.

In *Bullington* the Court considered the double jeopardy claim of a convicted murderer who on appeal had secured a retrial due to constitutional errors at trial.[35] The state had sought the death penalty in the initial bifurcated proceeding, but the jury, after receiving evidence, at the sentencing hearing, declined to impose the death penalty and instead sentenced the defendant to life imprisonment.[36] At retrial, the state again sought the death penalty and revealed that it would introduce the same evidence concerning the aggravating circumstances that it had in the first

---

> to death except upon a finding, 'beyond a reasonable doubt,' of certain statutorily-prescribed 'aggravating factors.' These 'factors' might be conceived of as elements of the 'greater' crimes of 'capital murder/armed robbery' rather than simply as guides for the exercise of the sentencing authority's discretion to fix an appropriate punishment for one convicted of 'simple' willful murder and armed robbery.

[32] *See* Collins v. State, 415 N.E.2d 46, 50-51 (1981).

[33] In re Winship, 397 U.S. 358, 363 (1970) (quoting Davis v. United States, 160 U.S. 469, 493 (1895)) (emphasis added). *Winship* does not expressly hold that the right to a trial by jury extends to every essential factual element of the crime charged. *But see*, State v. Quinn, ___ Or ___, ___ & n.1, 623 P.2d 630, 644 & n.1 (1981) (Tongue, J., concurring). The exact holding of *Winship* is that, no matter who the fact finder may be, the state must prove the existence of every essential element of the crime charged beyond a reasonable doubt. However, joining that premise together with the constitutional right to a jury trial in all but petty criminal prosecutions results in the obvious conclusion that a defendant in a serious criminal prosecution has a right to a jury trial of every essential element of the crime charged.

[34] 451 U.S. 430 (1981).

[35] *Id.* at 435-37.

[36] *Id.* at 435-36.

trial.[37] The defendant challenged the state's attempt to seek the death penalty at his retrial, arguing that the double jeopardy clause barred the imposition of the death sentence after the first jury had declined to impose it.[38] The Court held that the double jeopardy clause prohibited the state from obtaining a second chance to prove that this defendant's crime warranted the death penalty.[39]

The dissent was upset by what it considered to be the majority's departure from a long line of precedents which held that the double jeopardy clause did not apply to sentencing decisions after retrial "with the same force that it applie[d] to redetermination of guilt or innocence."[40] The linchpin for the majority, however, was the additional factual adjudication which was required before a murder could be considered a capital murder and punished by death.[41] The majority recognized that the sentencing stage of the capital murder trial had "the hallmarks of the trial on guilt or innocence,"[42] and "*was itself a trial on the issue of punishment.*"[43] The state had undertaken "the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts,[44] and the Court went on to note that "by enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence . . . Missouri *explicitly requires* the jury to determine whether the prosecution has proved its case."[45] The Court concluded that "[a] verdict of acquittal on the issue of guilt or innocence is, of course absolutely final. The values that underlie this principle . . . *are equally applicable when a jury has rejected the State's claim that the defendant deserves to die . . . .*"[46]

The *Bullington* Court relied heavily upon *Green v. United States*[47] which held that a jury conviction for the lesser included offense of second-degree murder operated as an "implied acquittal" of the greater charge of first-degree murder and barred subsequent retrial for that first-degree murder charge.[48] *Green* thus puts in context the *Bullington* Court's statement that "the sentence of life imprisonment which petitioner received at his first

---

[37] *Id.* at 436.

[38] *Id.*

[39] *Id.* at 446. The double jeopardy clause of the fifth amendment is, of course, made applicable to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969).

[40] *Bullington*, 451 U.S. at 447 (Powell, J., dissenting).

[41] *Id.* at 444. The majority distinguished the earlier cases dealing with double jeopardy challenges to sentencing decisions by pointing out that those earlier decisions were not made in an adversary context under statutory standards and guidelines. *Id.* at 443-45.

[42] *Id.* at 439.

[43] *Id.* at 438 (emphasis added).

[44] *Id.* at 438.

[45] *Id.* at 444.

[46] *Id.* at 445 (emphasis added).

[47] 355 U.S. 184 (1957).

[48] *Bullington*, 451 U.S. at 443-45.

trial meant that 'the jury has already *acquitted* the defendant of whatever was necessary to impose the death sentence.' "[49]

Although the Court used the word "acquittal" without articulating the obvious underlying premise that, conceptually, a defendant can only be acquitted of a crime and not a sentence, the *Bullington* Court's reliance upon *Green* must indicate that they recognized the existence of the greater crime of capital murder and the lesser included offense of mere murder. Indeed, recognition of this concept was the only possible basis for harmonizing *Bullington* with longstanding tenets of double jeopardy doctrine which allow a harsher sentence on retrial, even in the pre-*Furman* death penalty cases, yet forbid retrial for a greater offense following a conviction for a lesser included offense.[50]

Distinctions Without a Difference

Bullington adds further support to the concept of two distinct crimes of murder as articulated above and demonstrates how the substantive and procedural aspects of bifurcated capital murder trials have obscured the traditionally sharp distinction between determinations of guilt and assessments of punishment, a distinction with important procedural due process ramifications. Despite the blurring of this traditional distinction, some scholars have attempted to articulate a constitutional difference between the determination of facts necessary to establish guilt and those necessary to impose a particular sentence. These distinctions would prevent the full extension of procedural due process protections to the capital sentencing decision.

These suggested distinctions are, however, not dispositive of the due process question, and tend to be, at best, unhelpful, and in some cases, patently wrong. On the other hand, a pair of Supreme Court cases suggest that the proposed distinctions between the factual determination of guilt and the factual imposition of a capital sentence is a distinction without a difference, and that for purposes of due process analysis, the similarities are substantially more significant.

In *State v. Quinn*,[51] the Oregon Supreme Court declared that state's

---

[49] *Id.* at 445. On this point, the majority incorporated the sound dissent of Chief Justice Bardgett in the lower court's ruling. *See* State *ex rel.* Westfall v. Mason, 594 S.W.2d 908, 922 (Mo. 1980) (Bardgett, C.J., dissenting).

[50] *Compare* North Carolina v. Pearce, 395 U.S. 711 (1969) *and* Stroud v. United States, 251 U.S. 15 (1919) (a defendant whose conviction is reversed may receive a more severe sentence upon retrial) *with Green*, 355 U.S. 184 (1957) (a defendant could not be retried for first-degree murder after a jury at his first trial had convicted him of only second-degree murder). *See also* United States v. DiFrancesco, 449 U.S. 117 (1980). "[T]he difference in result reached in *Green* and *Pearce* can be explained only on the grounds that the imposition of sentence does not operate as an implied acquittal of any greater sentence." *Id.* at 136, n.14.

[51] ___ Or. ___, 623 P.2d 630 (1981).

death penalty to be an unconstitutional denial of a defendant's right to a trial by jury because the statute allowed the judge to impose the death penalty upon a finding of premeditation made by the court once the jury had found an intentional killing.[52] The court acknowledged that it had, in the past, upheld other enhanced penalty statutes even though they too required additional post trial fact findings as the basis for a more severe sentence.[53] The difference, however, between those statutes and the death penalty law at issue was, according to the court, "found in the simple principle that the facts which constitute the crime are for the jury and those which characterize the defendant are for the sentencing court."[54] The court then applied this distinction to the terms of the death penalty statute:

> [D]eliberation in the act of homicide is part of an act declared by the legislature to be criminal. Because the extent of punishment is to be determined according to the existence of that proscribed fact, it must be proved at trial. The contrast is clear: Deliberate homicide is not a status; it is an offense. If a defendant is to be punished for it, he is entitled to require the state to prove it to a jury.[55]

Although the court did ultimately conclude that the defendant was entitled to a jury determination on the question of sentencing, it is its distinction between acts and status, which could produce the opposite result under a differently constructed statute, that is troublesome. Its foremost problem is that it does not readily lend itself to any sort of reasonable "bright line" test when the precise death penalty statutory language is analyzed.[56] This is apparent when one considers that an aggravating circumstance common to many death penalty statutes is that the murder was especially heinous or cruel.[57] It is very difficult to tell whether this aggravating circumstance is meant to describe the types of criminal acts for which the death penalty is being sought or whether it merely characterizes the

---

[52] *Id.* at ____, 623 P.2d at 644.

[53] *Id.* at ____, 623 P.2d at 643. The court noted that it had upheld the state's habitual offender and sexually dangerous offender laws over challenges similar to that on which the state's death penalty law was now being struck down. *Id.*

[54] *Id.*

[55] *Id.*

[56] This particular problem was singled out by Justice Peterson in his concurrence:

> I am convinced that [in this case] the . . . element of deliberateness is one of the facts which constitute the crime, and therefore the defendant is entitled to a jury. But while it is easy to state the simple principle, I fear future cases will arise which make the application of the simple principle difficult.

Quinn, ____ Or. at ____, 623 P.2d at 655-56 (Peterson, J., concurring) (quotations omitted). The majority opinion itself noted that under its distinction there were aggravating circumstances other than the requisite mens rea of the crime that would appear to constitute the criminal act. *Id.* at 644.

[57] *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-46a(S)(4) (Supp. 1982); DEL. CODE ANN. tit. 11, §4209(e)(n) (Supp. 1982); FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1982); IDAHO CODE §19-2515(f)(5) (1979); NEB. REV. STAT. § 29-2523(1)(d) (1979).

defendant as the type of sadistic murderer who justly deserves the death penalty. It is a distinction which is basically useless since most statutory aggravating and mitigating circumstances arguably involve questions of fact about the defendant's acts.[58]

Justice Powell, dissenting in *Bullington v. Missouri*, proposes a different distinction between determinations of guilt or innocence and sentencing.[59] According to Justice Powell, an objective truth underlies the question of guilt or innocence; the defendant in fact did or did not do the criminal acts charged.[60]

> From the time an accused is first suspected to the time the decision on guilt or innocence is made, our criminal-justice system is designed to enable the trier of fact to discover that truth according to law. But triers of fact can err, and an innocent person can be pronounced guilty. In contrast, the law provides only limited standards for assessing the validity of a sentencing decision. *The sentencer's function is not to discover a fact but to mete out just deserts as he sees them.* Absent a mandatory sentence, *there is no objective measure by which*

---

[58] Consider Justice Peterson's query. After expressing his concern with the majority's "simple principle" he asked: "[f]or example, if our death penalty law were identical to Florida's . . . , could aggravating factors (c) through (h) properly be considered by the court rather than a jury? Would those factors be 'the facts which constitute the crime'?" *Quinn*, ___Or. at ___ n.7, 623 P.2d at 656 n.7.

The Florida statutory aggravating circumstances to which Justice Peterson referred are:

> (a) The capital felony was committed by a person under sentence of imprisonment.
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
> (c) The defendant knowingly created a great risk of death to many persons.
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> (f) The capital felony was committed for pecuniary gain.
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
> (h) The capital felony was especially heinous, atrocious, or cruel.

FLA. STAT. ANN. § 921.141(5)(a)-(h) (West Supp. 1982).

Indiana's aggravating and mitigating circumstances pose similar difficulties if analyzed using the *Quinn* status/act test. *See* IND. CODE material cited *supra* note 4. Keeping in mind that mental states as well as physical acts constitute elements of the crime, aggravating factors (b)(1)-(6) all involve questions of fact about the defendant's acts or motives. Aggravating factor (b)(1), in fact, produces the very result prohibited by the *Quinn* court: the defendant may be sentenced to death by a judicial determination of the requisite mens rea of intent. Assuming that mitigating factor (c)(1) is meant to be limited to the defendant's official police record, the other five mitigating circumstances, enumerated (c)(2)-(6), all require factual determinations about the defendant's acts or mental state in regard to the murder charged.

[59] 451 U.S. at 447-53.

[60] *Id.* at 450.

the sentencer's decision can be deemed correct or erroneous if it is duly made within the authority conferred by the legislature.[61]

While the Oregon Supreme Court's distinction between status and acts has utility within a limited range, Justice Powell's distinction between objective and subjective is clearly incorrect, ignoring more than a decade of Supreme Court precedent. Subjective imposition of the death penalty was forbidden by the Supreme Court in *Furman v. Georgia*[62] in 1972. Indeed, the constitutional state death penalty statutes are all based on the assumption that the sentencing procedure is a rational process, that the sentencer's discretion can be directed and limited, and that a sentencing decision can be rationally reviewed by the state's highest court by certain objective standards.[63] A death sentence, like any guilty verdict, would have to be overturned if the supporting factual determinations were shown to be unsupported by objective and sufficient evidence.[64]

In the end, the main criticism of both of these distinctions is that neither seems to be *constitutionally* significant; neither distinction justifies drawing a due process line between those elements to which constitutional procedural protections would extend and those elements to which it would not. The distinction between status and act would cut a vague and ragged line between the factors which most state death penalty statutes currently deem to be significant. Justice Powell's distinction between objective and subjective, is at once both over and under inclusive. Many sentencing factors are obviously "objective" factors while others are arguably no more subjective than factors traditionally considered to be the proper subject of a jury determination.[65]

Balanced against these questionable distinctions is a pair of Supreme Court cases, *Mullaney v. Wilbur*[66] and *Patterson v. New York*,[67] which sug-

---

[61] *Id.* (emphasis added).

[62] 408 U.S. 238 (1972). Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 188-89 (1975).

[63] All of the state death penalty statutes require review by that state's highest court, and most require that court to promulgate rules by which the sentencing proceeding will be reviewed. *See, e.g.*, IND. CODE § 35-50-2-9(h) (1977); *see generally* Note, *Proportionality Review and the Indiana Death Sentence*, 58 *Ind. L.J.* ____ (1983).

[64] State v. Jordan, 126 Ariz. 283, 286, 614 P.2d 825, 828 (1980); State v. Culberth, 390 So. 2d 847 (La. 1980). "In every case where the death sentence is recommended this court must determine whether the aggravating circumstances cited by the jury are supported by the evidence." *Id.* at 850.

[65] For example, juries have traditionally been given evaluative questions of fact concerning the defendant's acts or mental state such as "reasonableness," "willful and wantonness," and, perhaps most subjective of all, "sanity."

[66] 421 U.S. 684 (1975).

[67] 432 U.S. 197 (1977).

gest a constitutionally significant *similarity* between the factual elements of a crime and the factual determinations necessary to support the death penalty. *Mullaney* and *Patterson* are relevant because they were the Supreme Court's attempt to define which factual issues in a criminal trial warrant procedural due process protections. In *Mullaney* and *Patterson* the specific procedural protection was the requirement that the state shoulder the burden of proving each element of the crime, while in the present case the procedural protection implicated is the right to demand a jury determination of each element of the crime. In both instances the scope of the right is measured by a determination of which factual issues constitute the elements of the crime charged.

In *Mullaney* the defendant attacked the constitutionality of Maine's homicide law. Maine law recognized but one generic crime of felonious homicide with two punishment categories: murder, punishable by a life sentence, and manslaughter, punishable by a fine or imprisonment not to exceed twenty years.[68] The state assumed the burden of proving that the defendant's actions were unlawful and intentional, which under the statute established the felonious homicide, and then allowed the jury to presume from those two elements that the homicide was "with malice aforethought," thereby establishing murder.[69] A defendant, in order to rebut that presumption and establish that his act merely constituted manslaughter, had the burden of proving that his act was done not with malice aforethought but "in the heat of passion, on sudden provocation."[70]

The defendant argued, on the basis of *In re Winship*,[71] that requiring a defendant to negate malice aforethought was a violation of the due process requirement that the state prove each element of the crime.[72] Maine, in response, pointed out that as a matter of form the issue of the presence or absence of provocation was not a fact necessary to constitute the crime of felonious murder but was merely a policy factor affecting the extent of punishment.[73] The Court rejected Maine's contention stating that:

> The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. . . .
>
> Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine

---

[68] *Mullaney*, 421 U.S. at 688-89. *See also* ME. REV. STAT. ANN. tit. 17, §§ 2551, 2651 (1964) (repealed 1976).

[69] *Mullaney*, 421 U.S. at 688, 691.

[70] *Id.* at 688, 691-92.

[71] 397 U.S. 358 (1970).

[72] *Mullaney*, 421 U.S. at 684.

[73] *Id.* at 696-97 & n.23.

> the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. . . .
>
> *Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the 'operation and effect of the law as applied and enforced by the State,' . . . and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.[74]

Many commentators foresaw a sweeping substantive change in the penal laws of the states because of *Mullaney* which would force the prosecution to prove beyond a reasonable doubt *any* fact affecting the defendant's criminal culpability, from affirmative defenses to sentencing reports.[75] Concerned that *Mullaney* would severely impede legislative reform of the criminal justice system and possibly result in the repeal of modern penal codes with many ameliorative affirmative defense provisions, the Court, in *Patterson v. New York*[76] sharply curtailed *Mullaney*.[77] Decided just two years later and under remarkably similar facts,[78] *Patterson* stated that although it was argued that *Mullaney* required that any "identified fact" which affected the "blameworthiness of an act or the severity of the punishment" be considered an element of the crime, the "*Mullaney* holding should not be so broadly read."[79] Rather the Court held that due process protection attaches to only those "fact[s] which the State deems so important that [they] must be either proved or presumed . . . ."[80] Perhaps aware that this delineation of which elements a state must prove was somewhat tautological, the Court issued the warning that "there are obviously constitutional limits beyond which the States may not go"[81] in deleting elements from the definition of a crime.

There are two important concerns behind the *Patterson* decision. First, perhaps due to federalism concerns, the Court was extremely reluctant to begin a wholesale substantive due process review of state penal laws.[82]

---

[74] *Id.* at 698-99 (citations omitted).

[75] *See, e.g.*, Note, *Affirmative Defenses After* Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171 (1976); Note, *Affirmative Defenses in Ohio After* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828 (1975); Comment, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard*, 11 Harv. C.R.-C.L. L. Rev. 390 (1976).

[76] 432 U.S. 197 (1977).

[77] *Id.* at 214-15 & n.15.

[78] The New York law on second-degree murder had two elements: the intent to cause the death and causation. The third factor, malice aforethought, which the Maine law had allowed the jury to presume, was entirely deleted as an element. The mitigating factor on which the defendant had the burden of proof was "extreme emotional disturbance" a broader category than Maine's "heat of passion." *See id.* at 216-21 (Powell, J., dissenting).

[79] *Id.* at 214-15 (opinion of the Court).

[80] *Id.* at 215.

[81] *Id.* at 210.

[82] *See id.* at 201-02. On this point, Justice Powell noted that "[t]he Court beats its retreat from *Winship* apparently because of a concern that otherwise the federal judiciary will intrude too far into substantive choices concerning the content of a State's criminal law." *Id.* at 227-28 (Powell, J., dissenting).

Second, the Court apparently thought that if a state had the power to completely disregard a factor in setting standards of criminal culpability, then it surely should be able to allow consideration of that factor but require that the defendant assume the burden of proving that factor.[83] Therefore, *Patterson* would seem to define the elements of a crime to which procedual due process attaches as those factual ingredients that the state, as a matter of substantive policy, deems crucial for the determination of culpability, but constrained by constitutional requirements such as proving the existence of actus reus and scienter.[84]

Under this interpretation of *Patterson*, procedural due process must attach to both capital murder aggravating factors and their relationship with any mitigating factors. The substantive content of these factors are facts which the state has deemed to be so important in assessing the culpability of a criminal defendant that it has undertaken the task of proving their existence. Much more importantly, these factors, whatever content the state may give them, *are constitutionally essential* to establish the qualitatively greater crime of capital murder.[85]

In another context, the Supreme Court has acknowledged that despite formal structure there exists no significant difference between defining capital murder so as to include aggravating factors and defining those aggravating factors as sentencing standards for the crime of mere murder. Chief Justice Burger, in his dissenting opinion to *Furman*, noted that:

> [L]egislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.
>
> . . . .
>
> . . . [T]hese two alternatives are substantially equivalent.[86]

Likewise the plurality opinion of Justices Stewart, Powell, and Stevens in *Jurek v. Texas*[87] concluded that:

> While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which the death sentence may ever be

---

[83] *See Patterson*, 432 U.S. at 207-08. "The Due Process Clause . . . does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment." *Id.*

[84] *See, e.g.*, Powell v. Texas, 392 U.S. 514, 535 (1968); Robinson v. California, 370 U.S. 660 (1962) (holding that criminal punishment for narcotics addiction constitutes cruel and unusual punishment); *see also* Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1365-78 (1979).

[85] *See supra* text accompanying notes 30-39.

[86] Furman v. Georgia, 408 U.S. 238, 400 & n.30 (1972).

[87] 428 U.S. 262 (1975).

> imposed serves much the same purpose. . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed.[88]

It is, of course, obviously true that there is no *functional* difference between these two methods of defining the crime of capital murder. Nonetheless, there is one terribly unconscionable difference. Under the Texas death penalty statute a defendant would have a *constitutionally protected right* to a jury trial of the facts which constitute the crime of capital murder; under the Georgia statute, the defendant has a *gratitious grant* of a jury trial of those same factors; under Florida law the defendant has *no* right to a jury trial. This "now-you-see-it-now-you-don't" approach, caused by an admittedly insubstantial distinction, is totally inappropriate for a right which the Constitution views as a "fundamental matter."[89]

No matter what distinction may be attempted, there is one similarity between all of these questions of fact in the sentencing stage: they are all factors which establish the defendant's greater criminal culpability and justify the state's imposition of its harshest punishment.[90] Because the determination of these factors is a statutory and constitutional prerequisite to the imposition of the death penalty, any one of the underlying facts must be considered a fact that is *necessary* to establish the crime charged and therefore the proper subject of a due process analysis.

EVOLVING STANDARDS OF DUE PROCESS AND THE *PROFFITT* DICTA

It is clear that some procedural due process guarantees attach to the

---

[88] *Id.* at 270 (opinion by Stewart, Powell & Stevens, JJ.) (citations omitted).

[89] Bloom v. Illinois, 391 U.S. 194, 208 (1967).

[90] Missouri Supreme Court Justice Seiler, in his dissent to the lower court treatment of *Bullington*, disputed the majority's assertion that the jury's sole function at the sentencing proceeding was to assess the proper punishment.

> [T]he principle opinion makes much of the fact that there is but one crime of capital murder and refuses to acknowledge that the statutory framework treats capital murder markedly different than any other crime . . . and that taken alone [the statutory definition of capital murder] is incomplete. Without a penalty being prescribed, it is no more than an abstract declaration of law. A killing may be unlawful, willful, knowing, deliberate, and premediated, yet that is not all capital murder encompasses. In addition to guilt, there must also be found by a jury, beyond a reasonable doubt, aggravating circumstances which the jury must designate in writing in its verdict. Capital murder is meaningless without the punishment. There is no such thing as a conviction of capital murder per se without more. It has to be either capital murder with death or capital murder with life imprisonment. . . . This does not "rend" the crime of capital murder. Rather, it recognizes what we all know to be a fact.

State *ex rel.* Westfall v. Mason, 594 S.W.2d 908, 924 (Mo. 1980) (Seiler, J., dissenting).

sentencing stage of a capital murder trial. The more difficult question is whether the full panoply of due process guarantees apply. High courts in several states have rejected the notion that a defendant is entitled to a jury determination of all the factual elements necessary to support the death penalty.[91] These decisions have dismissed the argument summarily with very little analysis other than citation to dicta[92] in *Proffitt v. Florida*,[93] in which the Court, comparing two different state death penalty statutes noted that:

> [t]he basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than the jury. This Court has pointed out that jury sentencing in a capital case can perform an important social function, . . . but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing, should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial court judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.[94]

This passage, almost in the form of historical observation, that the Supreme Court "has never suggested that jury sentencing is constitutionally required," may or may not be viewed as a holding.[95] It should be pointed out that, as shown by the quotation itself, the Court's attention in *Proffitt* was focused primarily upon the need for consistency as a means of avoiding the eighth amendment prohibition against cruel and unusual punishment.[96] If consistency were the only constitutional concern involved, then it would be impossible to deny that a judicial determination of the sentencing facts is as fair a determination as one made by a jury.

But since 1976 the Supreme Court has become increasingly concerned with the procedural due process aspects of capital punishment.[97] Shortly

---

[91] *See, e.g.*, State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979); State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied*, 434 U.S. 878 (1978); State v. Weind, 50 Ohio St. 2d 224, 364 N.E.2d 244 (1977), *vacated on other grounds*, 438 U.S. 911 (1978).

[92] *See, e.g.*, *Watson*, 120 Ariz. at 447, 586 P.2d at 1259; *Simants*, 197 Neb. at 558-59, 250 N.W.2d at 887.

[93] 428 U.S. 242 (1975).

[94] *Proffitt*, 428 U.S. at 252 (plurality opinion of Powell, Stevens & Stewart, JJ.).

[95] Despite the several courts referred to in *supra* note 91 which clearly considered this portion of the *Proffitt* plurality controlling, Justice Peterson in *Quinn* could concede only that the Supreme Court had *possibly* rejected the argument that "the imposition of the death penalty by the judge, in the bifurcated postverdict hearing violates the defendant's right to a jury trial." ___ Or. at ___, 623 P.2d at 653 (Peterson, J., dissenting). Neither position seems accurate considering the lines on which the case was decided. *See supra* note 94.

[96] *See, e.g.*, *Proffitt*, 428 U.S. at 251-59 (plurality); *Proffitt*, 428 U.S. at 260-61 (concurrence).

[97] Sher v. Stoughton, 516 F. Supp. 534, 547 (N.D.N.Y.), *rev'd on other grounds*, 666 F.2d 791 (2d Cir. 1981). *See generally*, Note, *The Impact of a Sliding Scale Approach to Due Process on Capital Punishment Litigation*, 30 SYRACUSE L. REV. 675, 675-81 (1979).

after *Proffitt*, three Justices acknowledged the "obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society."[98] The plurality declared that "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirement of the Due Process Clause."[99] Two years later the Supreme Court confirmed its shift in emphasis from an eighth amendment analysis to a due process review,[100] and held that "fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determination phase of any criminal trial."[101]

The evolving concept of procedural due process in the capital sentencing proceeding has transformed the constitutional landscape in this area in the last decade. Sentencing, which was once considered a matter of unfettered discretion in capital cases is now subject to a wide range of constitutional procedural safeguards. In a capital murder sentencing proceeding, the defendant has the right to counsel,[102] the right to confront witnesses,[103] the right to notice of the state's evidence,[104] the right to introduce all relevant mitigating evidence[105] even if it might be excludable under state rules of evidence,[106] and the right to double jeopardy protection on sentencing issues when granted a retrial.[107]

Due process, perhaps more than any other area of constitutional law, is a reflection of society's ever changing values and interests.[108] It is not static and, especially in the area of capital punishment, a holding that

---

[98] Gardner v. Florida, 430 U.S. 349, 357 & n.7 (1977) (plurality opinion of Stevens, J., joined by Stewart & Powell, JJ.).

[99] *Id.* at 358. The potential ramifications of the plurality's assertions are broad indeed when one considers the separate opinions of Justice Brennan and Justice Marshall. Justice Brennan commented, "I agree for the reasons stated in the plurality opinion that the Due Process Clause . . . is violated [by the sentencing procedure used by] the sentencing judge." *Id.* at 364. Justice Marshall noted the sentencing procedures used by the trial judge are "[o]bviously . . . enough to deny due process." *Id.* at 365.

[100] *See* Note, *supra* note 97, at 676 n.8. This is not meant to suggest that the Court has discarded its eighth amendment analysis altogether or that in an appropriate case it will not return to an eighth amendment analysis. In theory, however, most state death penalty statutes now meet the demands of the eighth amendment through the use of various safeguards designed to prevent arbitrary or capricious results on the whole. *See supra* note 10. The current focus is on the individual and the trial rather than upon the statutes, in an effort to refine the process through which the death penalty is imposed.

[101] Presnell v. Georgia, 439 U.S. 14, 16 (1978) (per curiam).

[102] Specht v. Patterson, 386 U.S. 605, 610 (1967).

[103] *Id.*

[104] Gardner v. Florida, 430 U.S. 349, 361 (1977).

[105] Lockett v. Ohio, 438 U.S. 586, 605 (1978).

[106] Green v. Georgia, 442 U.S. 95, 97 (1979).

[107] Bullington v. Missouri, 451 U.S. 430, 446 (1981).

[108] "It is the progression of history, and especially the deepening realization of the substance and procedures that justice and the demands of human dignity require, which has caused this Court to invest the command of 'due process of law' with increasingly greater substance." Bloom v. Illinois, 391 U.S. 194, 212 (1968) (Fortas, J., concurring).

certain procedural protections are not constitutionally required cannot be presumed to be written in stone.[109] Developments in constitutional law concerning the death penalty since *Proffitt*[110] and the developing trend of refining the procedure for imposing the death penalty now suggest the need for a much more thorough treatment of this topic by the United States Supreme Court. However, the shift to a due process analysis by the Court and the trend to extend procedural rights to the sentencing stage of the capital murder trial does not automatically guarantee a defendant a right to a jury determination on sentencing issues. "The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights. 'Once it is determined that due process applies, the question remains what process is due.' "[111] Determining how much process is due can only be answered by balancing the rights and interests of the individual against those of the state.[112]

The most apparent state concern is the constitutional requirement that the death penalty not be imposed arbitrarily and the resultant notion, expressed in *Proffitt*, that judges are better able to impose consistent sentences because of their experience.[113] But while the goal of consistency is no doubt an essential state interest, the best means of achieving that goal is open to dispute. In any criminal trial there are factual determina-

---

[109] In Lockett v. Ohio, 438 U.S. 586 (1978), the Court noted that "[it] had never intimated prior to *Furman* that discretion in sentencing offended the Constitution. . . . As recently as McGautha v. California, 402 U.S. 183 (1971), the Court had specifically rejected the contention that discretion in imposing the death penalty violated the fundamental standards of . . . due process . . . ." *Id.* at 598 (citation omitted). *Compare* Bullington v. Missouri, 451 U.S. 430 (1981) (defendant in bifurcated capital sentencing proceeding is protected on retrial against imposition of the harsher punishment by the double jeopardy clause) *with* United States v. DiFrancesco, 449 U.S. 117 (1980) (defendant in bifurcated special dangerous offender sentencing proceeding has *no* right to double jeopardy protection against imposition of a harsher punishment upon appellate review of sentence).

[110] *See supra* notes 101, 104-07 and accompanying text which set out the case-by-case treatment of procedural due process rights in the capital sentencing proceeding provided by the Supreme Court.

[111] *Gardner*, 430 U.S. at 358 n.9 (quoting Morrisey v. Brewer, 408 U.S. 471, 481 (1972)).

[112] Such a balancing test is the usual method, endorsed by the Supreme Court, for determining what precise procedures are required by due process. *See Gardner*, 430 U.S. at 358-59; Bloom v. Illinois, 391 U.S. 194, 208 (1968).

[113] *Proffitt*, 428 U.S. at 252. *Contra* Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 58-59 (1980) (arguing that in actual practice few trial judges are exposed to a sufficient number of capital murder trials to support *Proffitt's* consistency argument); Duncan v. Louisiana, 391 U.S. 145, 153-58 (1967):

> [At] the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

Id. at 157 (citing KALVEN & ZEISEL, THE AMERICAN JURY (1966)).

tions which because of their complexity could be handled more consistently by an experienced trial judge, yet the American criminal justice system and our Constitution have made a conscious choice to retain the jury system because it has been thought that the jury can be adequately guided by instructions and statutes.[114] Under the procedures required by the Constitution for death penalty statutes, the danger of an arbitrary imposition of the death penalty by a jury is curbed. The jury decision is restricted to consideration of specific aggravating circumstances. The jury must usually find these circumstances beyond a reasonable doubt. Their findings must be in writing. The trial judge is often allowed to reduce any jury-imposed death penalty to a life sentence. The state's highest court is instructed to review the proceeding and compare it to similar capital trials. The United States Supreme Court has held that such safeguards are sufficient protection against arbitrary and capricous imposition of the death penalty.[115] These alternative safeguards and the fact that the majority of the modern death penalty statutes do not allow the judge to make the post-conviction factual fingings[116] belie any argument that there exists a strong state interest in denying a defendant a trial by jury in the sentencing proceeding.

The interest of a criminal defendant, on the other hand, in being able to plead his entire case to a jury of his peers can be of ultimate importance.[117] As Justice Fortas has stated, "the right to jury trial in major prosecutions, state as well as federal, is so fundamental to the protection of justice and liberty that 'due process of law' cannot be accorded without it."[118]

In addition to the personal rights and interests of the capital murder defendant, society also has an interest in allowing jury input into the

---

[114] "[I]mportant safeguards have been devised to minimize miscarriages of justice through the malfunctioning of the jury system. Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution." *Bloom*, 391 U.S. at 209 (1967).

[115] *Proffitt*, 428 U.S. at 247-53.

[116] *See supra* note 10.

[117] Citing the comparable guarantee to a jury trial found in Oregon's Constitution, Justice Peterson noted that:

> This constitutional right exists for the protection of every person in Oregon, and no statute which limits the right to a jury trial is enforceable. The right to a jury trial as to every element of a criminal prosecution is an important right—in some person's lives, it is their most important right.

State v. Quinn, ___ Or. ___, ___, 623 P.2d 630, 652 (1981) (Peterson, J., concurring).

Extending the right to a jury trial to the capital sentencing proceeding would also give the defendant the traditional right to have the jury nullify the law in his case, *see* Duncan v. Louisiana, 391 U.S. 145, 156 (1967), and possibly result in more consistency in the guilt determination stage of a capital murder trial. A jury which is denied the power to prohibit the death penalty may register their disapproval of that punishment by either acquitting the defendant or returning a verdict for a lesser offense when they would not have done so otherwise.

[118] *Bloom*, 391 U.S. at 212 (1967) (Fortas, J., concurring).

sentencing decision. Procedural safeguards have been developed to prevent capricious results, but the sentencing decision is hardly a purely mathematical calculation.[119] In addition to resolving questions of pure fact the sentencer is also called upon to decide if the mitigating circumstances *outweigh* the aggravating circumstances or whether it is probable that the defendant will constitute a continuing threat to society. The answers to these questions determine whether the defendant will live or die, yet these are special kinds of questions of fact. These questions require the sentencer to bring into the equation some notion of the values of the community. In this process the jury, in its role as the representative of the society, is much more qualified than a judge to identify which members of society are so dangerous and which acts are so reprehensible that they deserve society's most severe punishment.[120]

CONCLUSION

Because it is now constitutionally required that the death sentence be imposed only upon proof of specified facts and circumstances, it is possible to distinguish between the crimes of mere murder and captial murder. In a capital murder trial a criminal defendant should have a constitutional right to a jury trial of all the factual determinations essential to the imposition of the death penalty. Although the Supreme Court has long recognized a criminal defendant's right to a jury trial of all the factual elements of the crime for which he is charged, it has not recognized a right to a jury determination of sentencing facts. However, as *Bullington* illustrates, former constitutional distinctions between determinations of guilt and determinations of sentence are being re-examined in light of the evolving concepts of procedural due process for imposing the death penalty. The *Bullington* Court ignored the form of the sentencing proceeding and viewed it in substance as an additional trial in which the state had the burden of proving facts which would warrant the imposition of a more severe punishment. Because the state's ability to subject the defendant to the death penalty is based upon the establishment of additional factual circumstances, and because there is no counterbalancing

---

[119] "[T]he various [aggravating and mitigating] factors to be considered by the sentencing authority do not have numerical weights assigned to them . . . ." *Proffitt*, 428 U.S. at 258 (1975).

[120] [O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and capital punishment] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'

Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

state interest to the defendant's fundamental right to due process, the defendant is entitled to require the state to prove its case against him to the satisfaction of a jury.

DAVID R. SCHIEFERSTEIN